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(1958) 12 KAR CK 0009

In the Karnataka High Court

Case No : Writ Petition No. 12 of 1957

Syed Usman Sah — APPELLANT

Vs

State of Mysore and Another — RESPONDENT

Date of Decision : 19-12-1958

Acts Referred:
Madras General Sales Tax Rules, 1939 — Rule 18A

Citation : AIR 1960 Kar 93 : (1959) ILR (Kar) 351

Hon'ble Judges : M. Sadasivayya, J;A. Narayana Pai, J

Bench : Division Bench

Judgement

A. Narayana Pai, J.

(1) The petitioner is a P. W. D. contractor working in the Thungabhadra Project area. He had entered into contracts with the Superintending Engineer, Thungabhadra Hydro electric Scheme for construction of staff quarters at Kamalapur. In response to notices issued by the Deputy Commercial Tax Officer, Hospet, he made a return of a gross turnover of Rs. 30845-11-0 in respect of the year 1953-54, but claimed complete exemption from tax thereon on the ground that the entire turnover related to works contracts which could not be taxed in view of the decision of the Madras High Court reported in Cannon Dunkerley and Co., (Madras) Ltd. v. State of Madras AIR 1954 Mad 1130.

The Officer, however, declined to accept this contention of the petitioner and levied sales tax determining the petitioner''s turnover in accordance with the rules in force in Madras area relating to determination of turnover in respect of works contracts. This was by an order dated 29-6-1954 in Assessment No. A2. 4148/53-54. By the same order, he also made a provisional assessment in respect of the immediately of the immediately year 1954-55.

Subsequently on 6-6-55, a final assessment order was also passed in respect of the year 1954-55. An appeal against the latter order was dismissed by the Commercial Tax Officer, Bellary on 24-8-1955. On 11-1-1957, the petitioner

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presented this writ Petition in which the prayer is for the issue of "an appropriate Writ, order or direction directing the respondents to refund the sales tax illegally exacted from the petitioner in respect of his works contracts turnover." The respondents are the State of Mysore and the Deputy Commercial Tax Officer, Hospet.

(2) On behalf of the State, it has not been disputed that the turnover on which sale tax has been levied as aforesaid was turnover in respect of works contracts, which were entire and indivisible. There is no suggestion that any part of this turnover related to any distinct or independent contracts for sale of material; not is it suggested that the contracts claimed to be works contracts by the petitioner can be broken up into several component parts as regards one or more of which it could be said that they represent distinct contracts or agreements for sale of materials as such.

(3) The view taken by the High Court of Madras in the case mentioned above has been confirmed by the Supreme Court of India on appeal is reported in The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., .

(4) On the admitted facts and in view of the clear pronouncement of the Supreme Court it has to be held that the assessment orders concerned in this petition are illegal.

(5) The learned Government Pleader states that in view of the pronouncement of the Supreme Court it is not possible to sustain the validity of the orders of assessment. He, however, points out that there is no prayer in the writ petition to quash these orders and that the only prayer made is for the issue of a mandamus for refund which ought not to be granted for several reasons.

In the first place he points out that a writ in the nature of mandamus directing a refund of a specified sum of money cannot be asked for because the refund as claimed in the writ petition is not on the basis that there is any statutory duty to make the refund but on the basis that the money the refund of which is claimed had been collected by orders which are subsequently found to be illegal.

In such a case, according to the learned Government Pleader, the party may have a right of action in which apart from the legality or illegality of the orders on the strength of which money had been collected, there may be other pleas available to the State by way of defence such as limitation estoppel or the like. He also points out that in this case, not only has the petitioner failed to specify the sums or specify the orders by virtue of which the said sums might have been collected from him, but he sums might have been collected from him, but he has come to this Court alter a lapse of nearly 2 1/2 years from the earlier of the orders and about 1 1/2 years from the later order.

(6) So far as the first part of the argument is concerned, we do not think that merely because the petitioner has not included a specific prayer for quashing the orders of assessment he would be disentitled from requesting this court to quash

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those orders.

For one thing the prayer for refund of tax collected on the basis of orders impugned as invalid necessarily involves a prayer for a declaration of the invalidity can be granted. Secondly in the face of the clear decision of their Lordships of the Supreme Court, we cannot permit the illegal orders to stand when they are brought to our notice, especially when in support of the petition the petitioner has cited not merely Art. 226 but also Art. 227 of the Constitution.

We cannot, however, lightly brush aside the reasons stated by the learned Government Pleader why a Writ of mandamus should not issue as prayed for by the petitioner. It cannot be doubted that the mandamus asked for is not in enforcement of a statutory duty which the respondents are obliged to perform in relation to the petitioner. Right to refund necessarily rests on the declaration of the invalidity of the orders on the strength of which the tax had been collected.

The learned counsel for the petitioner has drawn our attention to the recent decision of the Supreme Court reported in Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, , which, according to him justified his prayer for the issue of a mandamus for refund of money. In that case after the declaration of invalidity of tax levied under U. P. Sale Tax Act on forward transactions in silver bullion, the assessee filed a writ petition before the High Court of Allahabad under Art. 226 of the Constitution asking for a writ of certiorari quashing certain assessment orders and a writ of mandamus requiring the State to refund the amount collected by way of tax under those orders and the High Court granted the prayers.

The orders of the High court were ultimately confirmed by the Supreme Court. The question now posed before us by the learned Government Pleader was not, however, dealt with or decided upon by the Supreme Court. Before the High Court the Advocate-General had categorically stated that he would not contend that the assessee ought to have proceeded for the recovery of the amount claimed otherwise than by way of a writ petition.

When the Solicitor-General wanted to urge before the Supreme Court that a writ petition could not lie for recovery of moneys, their Lordships of the Supreme Court did not permit him to raise that question in view of the categorical statement made by the Advocate General before the High Court. The Orders of the High Court were, therefore, passed virtually or solely on the concession made by the Advocate General.

We believe that such a concession would have meant no more than that when the High Court declares a particular levy to be illegal, the Executive Officer of the State would naturally respect the decision and themselves make a refund without requiring the successful assessee to take further proceedings. That does not mean that a mandamus for recovery of money could issue as a matter of course.

As pointed out by the learned Government Pleader before us, the claim for

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refund itself being a justifiable claim., which the State like any other party would be entitled to meet by raising such pleas as may be available to it under the law, we should not by the issue of a writ of mandamus immediately deprive the State of the liberty of raising such pleas as may be available to it; not could we be asked to investigate the facts and circumstances on which such pleas may be ultimately founded. We are also impressed by the circumstance that the petitioner has not chosen to come to this court in good time, but only long after the impugned orders has been passed.

(7) In view of the above circumstances, we would have normally declined to make any orders on this petition, but for the fact that the orders of assessment are clearly unsustainable and in view of the provisions of S. 18A of the Madras General Sale Tax Act it is doubtful whether the petitioner could take any other proceedings to get the orders set aside.

(8) while refusing, therefore, to issue a writ of mandamus, we think that it is necessary in the interest of justice to quash the assessment orders dated 29-6-1954 and 6-6-1955 passed by the Deputy Commercial Tax Officer, of Hospet against the petitioner in Assessment No. A. 2.4148. We accordingly quash the said orders, so that they shall not be used to the detriment of the petitioner. We make no order as to costs.

(9) Order accordingly.

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